DAVIES

PERSPECTIVE

Canadian Competition Bureau Steps Up Enforcement against Joint Abuse of Dominance

Increased Canadian Enforcement Consistent with International Trends

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Abuse of dominance (monopolization) continues to be a significant enforcement priority for antitrust agencies around the globe, including in Canada. Further to that trend, the Canadian Competition Bureau announced on June 16, 2009, that the Commissioner of Competition has entered into a consent agreement with two commercial waste collection firms, Waste Services (CA) Inc. ("WSI") and Waste Management of Canada Corporation ("WM"), to resolve issues raised by contracts each firm used with its respective customers on Vancouver Island, British Columbia. Specifically, the allegation is that WSI and WM jointly engaged in an abuse of dominance by using long-term contracts and restrictive terms to lock in customers and exclude competitors.

According to the consent agreement, the Commissioner concluded that WSI and WM, two apparently unaffiliated companies, "collectively hold a market share exceeding 80%" and "are engaged in similar anti-competitive contracting practices". Notably, neither the Bureau's press release nor the consent agreement set out the individual market shares of WSI and WM nor indicate that the Bureau found any agreement or understanding between WSI and WM with respect to the challenged conduct. This apparent lack of explicit co-ordination or agreement between WSI and WM signals a more aggressive enforcement position from the Bureau with respect to joint abuse of dominance.

Relevant Provisions of the Competition Act

The abuse of dominance provisions of the *Competition Act* authorize the Commissioner to seek an injunction, certain types of remedial orders, or monetary penalties of up to $10 million (for a first "offence" and $15 million subsequently) where one or more persons substantially or completely control a class or species of business in all or part of Canada, the persons are engaging in a practice of anti-competitive acts, and the practice is preventing or lessening competition substantially. In this context, conduct intended to have

a predatory, exclusionary or disciplinary negative effect on a competitor or potential entrant is considered anti-competitive.

Although other provisions of the *Competition Act* specifically provide for possible remedies for certain types of exclusive dealing and tied selling that is widespread in a market (and therefore could capture parallel but uncoordinated conduct by competitors), the consent agreement alleges only a contravention of the abuse of dominance provisions.

Change in Enforcement Position Regarding Joint Dominance

The Bureau's agreement with the two waste companies signals an important change in its approach to issues of "joint dominance". For example, the Bureau's current abuse of dominance enforcement guidelines clearly indicate that some form of coordinated activities – at least more than consciously parallel conduct – would be required to establish joint control of a market. Similarly, the only prior enforcement action by the Bureau in a joint dominance context (i.e., where the individual parties could be not be considered dominant on their own) involved the Interac Association (a shared electronic financial services network), in which the challenged conduct was engaged in pursuant to agreements and by-laws between association members. The *Interac* case therefore provided a much clearer basis for asserting that the respondents jointly controlled the relevant market.

A shift in the Bureau's thinking was foreshadowed earlier this year when the Bureau released draft revised abuse of dominance guidelines as a proposed replacement to the current guidelines. The draft guidelines state that the Bureau will now consider the abuse of dominance provisions of the *Competition Act* to apply where two or more firms engage in "similar" anti-competitive practices and "together hold market power based on their collective share of the market, barriers to entry or expansion, and other factors". Coordination would no longer be necessary to establish joint control. Based on the materials available, the Bureau has apparently applied this new approach in its enforcement position in the waste case.

Details of Consent Agreement – Restrictions on Contract Terms

The consent agreement, which is in effect for seven years, prohibits WSI and WM from entering into any customer contracts that contain:

- an initial term of more than two years;
- renewal terms of more than one year;
- any limitation on the customer's ability to decline to renew the contract (other than having to provide 30 days' notice);
- a right of first refusal in favour of WM or WSI; or
- a requirement of the customer to pay liquidated damages in excess of certain specified amounts.

The agreement also restricts the enforcement of existing contracts that are inconsistent with the foregoing principles, but excludes from the restrictions certain types of contracts, such as contracts covering multiple geographic markets in addition to Vancouver Island. The consent agreement has been registered with the Competition Tribunal and is now enforceable as if it had been an order issued by the Tribunal itself.

Implications

Until recently, Canadian businesses that did not dominate any of their markets – e.g., had less than a 50% share or were not the market leader – had little cause to concern themselves with the risk of Bureau investigations under the abuse of dominance provisions in respect of their unilateral pricing and contracting practices. While the Competition Tribunal has yet to rule on the requisite elements of joint dominance in a fully contested case, these recent signals from the Bureau suggest that a wider range of businesses need to consider the collective impact of a broader range of pricing, contracting and other practices in their industries. It may be particularly difficult to manage the risk of engaging in "similar" anti-competitive conduct for businesses that do not have good insight into their competitors' practices. Presumably, the Bureau would still proceed only against relatively large competitors in an industry. One would also hope that, in the absence of an express or tacit coordination between the challenged competitors, the Commissioner would not seek any monetary penalties in addition to prohibitions or remedial orders against firms alleged to jointly control a relevant market.

The Bureau's more aggressive stance on joint dominance may be seen as part of a more general effort to step up abuse of dominance enforcement activity in Canada. The Interim Commissioner of Competition recently stated that the Bureau is "looking at a number of challenging issues" involving abuse of dominance and "expects to be able to address some of those challenges through the resolution of cases this year". Similarly, in a recent presentation to the Canadian Bar Association, the head of the Bureau division responsible for civil enforcement stated that the Bureau is looking to bring cases to help clarify what would constitute a "substantial lessening of competition" under the abuse of dominance provisions as well as cases involving regulated industries and the denial of access to essential facilities by a dominant entity.

The Bureau's comments are consistent with increased abuse of dominance enforcement activity by the European Commission (which recently imposed a record fine of €1.06 billion against Intel) and statements by the new head of the Antitrust Division of the U.S. Department of Justice that it will be "aggressively pursuing such cases". The consistent message emerging from antitrust authorities worldwide is that we are entering a re-invigorated era of antitrust enforcement, particularly with respect to the unilateral activities of dominant (and perhaps jointly dominant) firms.

Click here for a copy of the consent agreement from the Competition Tribunal's website.

Click here for the Bureau's press release with respect to the consent agreement in the waste case.

If you have any questions regarding the foregoing, please contact George Addy, Anita Banicevic, John Bodrug, Mark Katz, Hillel Rosen or any other member of the Competition and Foreign Investment Review Group at Davies Ward Phillips & Vineberg LLP at 416.863.0900 (Toronto) or 514.841.6400 (Montréal).

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